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BEFORE THE ARIZONA CORPORATION C

GARY PIERCE
Chairman
BOB STUMP
Commissioner
SANDRA D. KENNEDY
Commissioner
PAUL NEWMAN
Commissioner
BRENDA BURNS
Commissioner

Arizona Corporation Commission

DOCKETED

FEB - 2 2012

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IN THE MATTER OF THE APPLICATION OF
THE BNSF RAILWAY COMPANY FOR A
WAIVER FROM A.A.C. R14-5-104(C)(6)

DOCKET NO. RR-02635B-11-0355

DECISION NO. 72799ORDER

Open Meeting
January 26, 2012
Phoenix, Arizona

BY THE COMMISSION:

FINDINGS OF FACT

1. On September 21, 2011, BNSF Railway Company ("BNSF" or "Railroad") submitted an application for waiver of Arizona Administrative Code ("A.A.C.") Rule R14-5-104(C)(6)(f) pertaining to temporary and permanent repairs to be performed at railroad crossings. Specifically, BNSF requested waiver of the requirement to perform temporary repairs at the Enterprise Road public crossing in Flagstaff, Arizona. Additionally, the Railroad requested a waiver from having to perform permanent repairs to the Fanning Drive public crossing, also located in Flagstaff, within 90 days of receiving Arizona Corporation Commission ("Commission") Railroad Safety Staff ("Staff") notification of defects at the crossing.

2. On June 30, 2011, Staff sent BNSF a letter by certified mail regarding temporary and permanent surface repairs for defects identified at 6 crossings in the City of Flagstaff. On June 3, 2011, Staff received a citizen complaint regarding rough crossing surfaces at Enterprise Road and Beaver Street. On June 21, 2011, a Staff inspector found that the two crossings were in need of repair. While in Flagstaff inspecting the two crossings, Staff observed four other crossings that belong to the Railroad that were also in need of crossing surface maintenance; San Francisco Street,

1 Steves Boulevard, Fanning Drive, and Cottage Avenue. Cottage Avenue was also found to be out of
2 compliance with the Commission's regulation regarding cross buck signage.

3 3. Commission regulations regarding crossing surface maintenance responsibilities are
4 set out in Arizona Administrative Code Rule R14-5-104. In particular:

5 R14-5-104 (C) (6) (a) states:

6 a. Whenever a highway intersects a railroad track at common grade, the appropriate
7 highway authority shall maintain and keep in repair the roadway approaches to within
8 2 feet of the outside of either rail, and the railroad shall maintain the planking or other
materials between the rails and for 2 feet on the outside thereof.

9 R14-5-104 (C) (6) (f) states

10 f. Temporary repairs shall be made until the arrival of materials necessary for
11 permanent repairs. Temporary repair shall be made within five working days of the
12 date that the railroad is notified of the defect by the Commission. Permanent repairs
shall be completed within 90 days from the date of notification.

13 4. On July 18, 2011, Staff received a letter from BNSF addressing each of the six
14 crossings that Staff had given notice for repair. The letter stated that the Railroad did not agree that
15 all of the crossings Staff had identified were in need of repairs. Of the six crossings addressed in the
16 letter from Staff, only one crossing, Steves Boulevard had been permanently repaired on July 11,
17 2011. In regards to the other five crossings, the letter stated that Enterprise Road would receive
18 permanent repairs in 2012; Fanning Drive had resurfacing done on Main Track Two only on June 17,
19 2011, however, no repairs were indicated for Main Track One; Cottage Avenue would receive
20 temporary repairs within 90 days from the date of their letter; Beaver Street crossing rehabilitation
21 was performed on Main Track One on April 20, 2011 but there were no repairs to Main Track Two;
22 and no maintenance was planned for San Francisco Street.

23 5. Additionally, the BNSF letter requested a conference call with Staff to try and resolve
24 this matter.

25 6. In response to the Railroad's letter, Staff prepared a response dated August 3, 2011, to
26 address the Railroad's lack of compliance with the initial grade-crossing maintenance letter. The
27 letter reiterated that Staff expected BNSF to comply with the initial maintenance letter for all
28 ...

1 crossings identified and permanent repairs to be completed by the end of the 90 day period, which
2 ended September 30, 2011. Staff also agreed to a teleconference with the Railroad.

3 7. On August 24, 2011, Staff participated in a teleconference with BNSF's
4 representatives and their attorney. Mr. Matt Keller, the Railroad's division engineer informed Staff
5 of BNSF's plans for the remaining five crossings. At Beaver Street, re-surfacing on Main Track Two
6 would be completed and the City would improve the roadway approaches by adding additional
7 asphalt to smooth out the transition to the crossing. Mr. Keller thought this would be accomplished
8 within a two month timeframe. At Fanning Drive, a complete crossing surface renewal is planned in
9 2012; however, no resources would be expended at this time for temporary repairs. At Enterprise
10 Road, Mr. Keller stated the crossing would receive permanent repairs in 2012 and the Railroad did
11 not believe temporary repairs were necessary. The work at San Francisco would be completed within
12 three weeks if the Railroad received a road closure from the City. The Railroad explained its plans to
13 do a temporary repair with cold mix asphalt within a month at Cottage Avenue and also install the
14 necessary signage to comply with the Commission regulation.

15 8. On September 21, 2011, pursuant to A.A.C. R14-5-104(C)(13) the Railroad filed an
16 application requesting a waiver from Commission regulation R14-5-104(C)(6)(f). In the application,
17 the Railroad states it is seeking relief from making temporary repairs at Enterprise Road, as well as
18 from the 90 day permanent repair requirement at Fanning Drive. Because the Railroad's 2011 budget
19 did not include monies for improvements at these crossings, the permanent repairs the Railroad
20 would be able to perform would be less substantial than if the Railroad were able to perform the
21 planned improvements that it has scheduled for 2012. The 2012 upgrades will extend the life of the
22 crossings considerably by installing a new standard of 11-foot concrete cross ties and 18-foot
23 concrete crossing surface panels. Currently, the crossings use 9-foot concrete cross ties and 10-foot
24 concrete surface panels. The waiver request states that both of these crossings have been funded for
25 upgrades in the Railroad's 2012 budget. On September 30, 2011 the 90 day period for permanent
26 repairs at all six crossings ended.

27 9. On October 17, 2011, Staff re-inspected the six crossings and found that Steves
28 Boulevard was the only crossing that had permanent repairs completed. The crossing repairs at

1 Beaver Street, San Francisco Street and Cottage Avenue that were discussed during the August 24th
2 conference call were not completed. However, the asphalt work and the cross buck signage were
3 completed at Cottage Avenue sometime in the week of October 24th.

4 10. In the Staff Memorandum discussing the Railroad's waiver request, Staff asserts that a
5 railroad's obligations under the rule are not predicated on a railroad's internal budgeting decisions
6 but on the relevant safety considerations raised by the conditions of the crossing. The availability of
7 funds within a railroad's budget for improvements in one year is an internal budgeting issue and does
8 not eliminate a railroad's obligation to maintain an appropriate surface quality at railroad crossings.

9 11. However, Staff further explains that due to the nature of the Flagstaff's unpredictable
10 winter weather conditions, it is not in the best interest of the City of Flagstaff and the traveling public
11 to try and make permanent repairs at this time. In order to ensure that the traveling public receives
12 the best crossing surface possible, heavy snow, ice or severely wet conditions should not be present at
13 the time of the permanent construction. With these types of conditions present the crossing surface
14 and sub-grade work could be compromised resulting in an uneven crossing surface. Furthermore, the
15 Railroad will need to coordinate road closures and permitting with the City of Flagstaff as well as the
16 Arizona Department of Transportation.

17 12. In light of these considerations, Staff recommends that the Commission grant the
18 waiver in this instance. Staff's recommendation is that the waiver be finite and limited to waiving the
19 time period for compliance with the requirement to perform permanent crossing repairs.

20 13. Staff notes that the waiver request extended only to the Enterprise Road and Fanning
21 Drive crossings. As such, Staff recommends that a waiver be granted solely for the Enterprise Road
22 and Fanning Drive crossings. Permanent repairs should be completed at these two crossings no later
23 than June 1, 2012. Within five (5) working days of the permanent repairs being completed, the
24 Railroad shall file a letter in this docket notifying the Commission of the completed work.

25 14. Staff further recommends that the Railroad file in the docket a written explanation as
26 to why the repairs and improvements at Beaver Street and San Francisco Street were not
27 implemented as discussed during the August 24, 2011 teleconference. Upon receipt and review of
28 this letter, Staff may bring the issue of these two crossings back to the Commission for further action.

1 15. Staff's recommendations are appropriate and will be adopted.

2 CONCLUSIONS OF LAW

3 1. The Commission has jurisdiction over BNSF Railway Company and the subject
4 matter contained herein pursuant to Article XV Sections 2 and 10 of the Arizona Constitution, A.R.S.
5 §§ 40-336 and -337 and A.A.C. R14-5-104.

6 2. The Commission, having reviewed and considered BNSF Railway Company's request
7 for waiver of A.A.C. R14-5-104(C)(6)(f) with respect to the Enterprise Road and Fanning Drive
8 crossings finds that granting the waiver, subject to the Staff recommendations described in Findings
9 of Fact 12 – 14, is in the public interest.

10 ORDER

11 IT IS THEREFORE ORDERED that BNSF Railway Company's request for a waiver of the
12 requirements of A.A.C. R14-5-104(C)(6)(f) with respect to the Enterprise Road and Fanning Drive
13 public crossings in Flagstaff are granted through June 1, 2012.

14 IT IS FURTHER ORDERED that within five business days of completing permanent repairs
15 to the Enterprise Road and Fanning Drive public crossings that BNSF Railway Company shall file a
16 letter in this docket notifying the Commission of the completed work.

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1 IT IS FURTHER ORDERED that within 15 days of the effective date of this Order that
2 BNSF Railway Company shall file in this docket a written explanation as to why indicated repairs to
3 the Beaver Street and San Francisco Street public crossings have not been implemented.

4 IT IS FURTHER ORDERED that this decision shall be effective immediately.

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6 **BY THE ORDER OF THE ARIZONA CORPORATION COMMISSION**

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CHAIRMAN

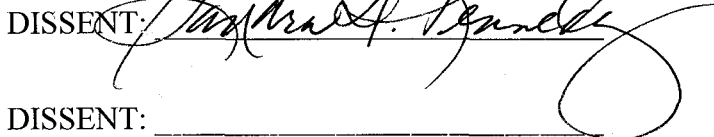

COMMISSIONER

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COMMISSIONER


COMMISSIONER

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12 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
13 Executive Director of the Arizona Corporation Commission,
14 have hereunto, set my hand and caused the official seal of this
Commission to be affixed at the Capitol, in the City of Phoenix,
this 2nd day of February, 2012.

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ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

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SERVICE LIST FOR: BNSF Railway Company
DOCKET NO. RR-02635B-11-0355

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January 31, 2012

Arizona Corporation Commission
Docket Control
RR-02635B-11-0355

RE: DISSENT LETTER FOR – BNSF RAILWAY COMPANY RR-02635B-11-0355

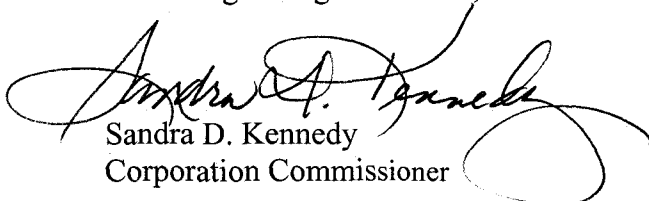
I am docketing this Dissent to explain my “No” vote on January 26, 2012 concerning BNSF’s application for a waiver of Commission Railroad Safety Rule A.A.C. R14-5-104 (C) (6) (F).

First, I want to inform all interested parties that if it was not clear at the Open Meeting on BNSF’s application for a waiver, that ***Public Safety is my priority when it comes to Railroad Safety Matters.*** The Commission’s rules were adopted and are enforced to ensure that Railway Crossings are properly maintained to promote public safety.

My review of this case indicates that BNSF appears to believe it may unilaterally pick and choose if and when it complies with the rules. In this instance, Commission’s Safety Staff first informed BNSF in June 2011 of its concerns related to needed repairs to several crossings in Flagstaff. However, it was only after numerous follow up discussions and correspondence with Staff that BNSF requested a waiver just a few days before the expiration of the 90 day period for compliance under the Rules.

BNSF provided various reasons as to why it has not timely completed the necessary maintenance and repairs. In my view, none of its reasons compels providing a waiver in this matter. Neither BNSF’s internal budgeting choices, nor its failure to complete the repairs prior to winter weather restrictions, absolves BNSF from timely compliance with Safety Rules.

In light of the above concerns for public safety and BNSF’s failure to demonstrate a reasonable basis for granting the waiver, I voted “No” in this matter.


Sandra D. Kennedy
Corporation Commissioner

Decision No. **72799**